IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION No. 208 OF 2002

1. M/s. Tulip Apparels)
2. Mr. Jayant Jadhwani)
Both having their place of business)
at 202, Sai Sangeet, Linking Road,)
Khar, Mumbai – 400 052)...Applicants
(Org. Accused Nos. 1 and 2)

Versus

1. Mrs. Urmi Jayesh Shah)
Sole Proprietor of M/s. Urmi International)
having her office at 104, Prashant)
Chambers, 74/78, Bhandari Street,)
Mumbai 400 003)

2. Mr. Jayesh Manubhai Shah)
Legal Representative of M/s. Urmi)
International and sole Proprietor of)
M/s. Urmi International, having her)
office at 104, Prashant Chambers,)
74/78, Bhandari Street, Mumbai-400 003)...Respondents
(Nos.1 and 2 -Org. Complainants)

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Mr.S.V. Marwadi for Applicants
Mr. M.G. Patil-APP for the State.
None for Respondent Nos.1 and 2

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CORAM : PRAKASH D. NAIK, J.

RESERVED ON : JANUARY 11, 2018.
PRONOUNCED ON : FEBRUARY 14, 2018.

<u>J U D G M E N T</u>:

1. The Applicants have invoked the revisional jurisdiction of this Court

and sought to challenge the order dated 5th March, 2002 passed by the Special Judge, Sessions Court, setting aside the order dated 8th February, 1999 passed by the Metropolitan Magistrate, 20th Court, Mazgaon, Mumbai in Criminal Case No. 1439/S/1998.

2. The Applicants were impleaded as Accused Nos. 1 and 2 in the aforesaid criminal complaint lodged by Respondent Nos.1 and 2 alleging offences under Sections 406, 418, 420, 426, 427 r/w. 114 of the Indian Penal Code.

3. Brief facts as alleged in the complaint are as follows:

(a) Complainant No.1 is a sole proprietor of M/s. Urmi International and Complainant No.2 is the legal representative of the said concern.

(b) Accused No.2 approached the Complainants along with Accused No.5 for purchase of Certificate of Quantity for CC Category 26 quantity 1592 pieces at the rate of Rs.76/- per piece amounting to Rs.1,20,132/-. Accused No.5 represented himself as an agent of Accused No.1 M/s. Tulip Apparels.

(c) Accused Nos. 1 and 2 confirmed the transaction jointly and severally with Accused No.5 for 1592 pieces for and on behalf of M/s. Tulip Apparels (Accused No.1). The said transaction is reflected under the Certificate dated 10th May, 1995 issued from M/s. Excel Apparels Exports Ltd., Mumbai for and on behalf of Accused No.1. Accused Nos. 1 and 2 as well as Accused No.5 agreed to make immediate payments against the aforesaid tranfer of Quotas in favour of Accused No.1.

(d) Accused No.5 won the confidence of the Complainants as he was interested in further business with them and in fact various transactions took place between them for various other parties. Accused No. 5 guaranteed for the payment of transactions which took place under Transfer Entitlement Certificate No. 601615. Accused Nos. 1 and 2 in active connivance with Accused No.5 guaranteed for the payment of the aforesaid transaction jointly and severally liable to pay the sum of Rs.1,20,232/-.

(e) In spite of repeated reminders and requests, as the payment was not coming. Accused No.5 then issued the cheque dated 19th May, 1995 which was duly signed by him. The said cheque for an amount of Rs.2,20,232/- was dishonoured when deposited. The aforesaid cheque was issued by Accused No.5 with an understanding that Accused No.5 has paid the complainants the sum of Rs. 1,20,232/- on account of M/s. Tulip Apparels, which was an outstanding amount. Accused No.5 paid the Complainants a sum of Rs.1,00,000/- for other transactions. Accused Nos.1,2 and 5 had no intention to make the payment towards the aforesaid transactions. The Complainants filed a separate complaint against Accused No.5 for an offence under section 138 of the Negotiable Instruments Act and under the provisions of the Indian Penal Code. The Complainant No.1 forwarded a legal notice dated 3rd June, 1995 to all the accused. The impugned complaint was, thereafter, filed as stated above for the aforesaid offences.

4. The Learned Metropolitan Magistrate took cognizance of the complaint and issued the process. The Applicants preferred an application for recall of process and/or dropping the proceedings against them before the Trial Court.

5. The said application was allowed by order dated 8th February, 1999 and the proceedings against the Applicants were dropped by recalling the

process issued against them. Respondent Nos.1 and 2 preferred Revision Application No.5402 of 1999 before the Sessions Court at Mumbai. The learned Special Judge vide order dated 5th March, 2002 allowed the said Revision Application and the order passed by the Trial Court dropping the proceedings was set aside and the Trial Court was directed to proceed with the matter. The said order is the subject matter of challenge in the present proceeding.

6. Shri Marwadi, learned counsel for the Applicants submitted that the impugned order is contrary to law. There is no element of breach of any penal provision in the impugned complaint and, therefore, the order passed by the learned Magistrate ought not to have been interfered with by the Special Court. It is submitted that the dispute, if any, is of civil nature and reading the complaint as it is, it does not make out any of the alleged offences. It is submitted that the cheque in relation to the subject transaction was issued by Accused No.5 which has been dishonoured. It is further submitted that the complainants had already initiated proceedings under section 138 of the Negotiable Instruments Act against Accused No.5. It is submitted that the fact that Accused No.5 had issued cheque in relation to the payment of Rs.1,20,232/- itself make it clear that the Applicants are not liable for the said payment and cannot be attributed

with any alleged offences. It is further submitted that the complaint does not qualify the ingredients to constitute the offences of cheating, criminal breach of trust and any other offences as alleged in the complaint. It is submitted that the application preferred by the Applicants for recalling of process and/or dropping the proceedings was allowed by the Court by assigning reasons for arriving at the said conclusion. There is no reason to set aside the said order. It is submitted that the Complainant had also filed a Summary Suit No. 3767 of 1996 against Accused No.1 and others for recovery of the said amount in the High Court and leave to defend the suit was granted to the accused unconditionally. It is submitted that, the transaction was executed through agent, Accused No.5 and the entire payment was entrusted to him, which is borne out by documents and hence Accused No.5 had issued the cheque. It is, therefore, prayed that the order passed by this Special Court be quashed and set aside by confirming the Trial Court's order, dropping the proceedings against the Applicants.

7. On perusal of the complaint, it appears that the complainants have alleged that the goods i.e. subject pieces were purchased for Accused No.1. It is also alleged that Accused Nos.1,2 and 5 had agreed for payment in relation to the said transaction which was Rs.1,20,232/-. Accused No.5 issued a cheque dated 19.5.1995 for Rs.2,20,232/- which was dishonoured

and the complaint was filed for an offence under section 138 of the Negotiable Instruments Act as well as under the Indian Penal Code against Accused No.5. The complaint also states that accused No.5 guaranteed the payment towards the subject transaction arising out of Certificate No.601615 and, thereafter, issued a cheque for the aforesaid amount. The complaint also alleges that Accused No.5 had also made a payment of Rs.1,00,000/- towards the other transactions and that he had executed several independent transactions with the Complainants. In respect to the dishonour of the cheque, admittedly the prosecution is lodged against Accused No.5 by the Complainants. On reading the complaint as it is, I do not find any element of cheating, criminal breach of trust and/or any other offences as alleged in the compliant against the Applicants. The complainants had already initiated prosecution against Accused No.5. The complainant has alleged that, accused No.5 had guaranteed the payment on behalf of the other accused and thereafter, issued a cheque. The amount due as alleged by the Complainants in respect of the subject transaction was Rs.1,20,232/-. Accused No.5 issued a cheque of Rs.2,20,232/-which allegedly includes the aforesaid amount. Accused No.5 had several transactions with the Complainants. The Complainant had accepted the cheque from accused No.5, which is dishonoured and for which the prosecution has been initiated. It is also pertinent to note that the Complainants had already initiated civil proceedings by filing suit for recovery of money against the Applicants and others. The Applicants are granted unconditional leave to defend the said suit by the Civil Court.

8. The Trial Court while dropping the proceedings, had observed that Accused No.5 was an agent, acting between the Complainants and the Accused towards the alleged transactions and that the entire payment of Rs.1,30,000/- was paid to Accused No.5 vide draft drawn on Indian Bank by cash and, thereafter, Accused No.5 had issued cheque in favour of the Complainants for which he is being prosecuted for dishonour of cheque, considering the fact that the Complainant had executed several transactions through Accused No.5. Reading the complaint, it does not make out the alleged offences against the Applicants. The dishonest intention to deceive right from inception is not reflected in the complaint. Admittedly,the Complainant has alleged that Accused No.5 had guaranteed the payment in respect to the said transaction. The learned Magistrate, therefore, recalled the process in accordance with the decision of the Supreme Court in **K.M. Mathews V/s. State of Kerala,** the prevailing decision at the relevant time. I do not find any reason to set aside the said order. The Sessions Court ought not to have set aside the order of the Learned Magistrate. While passing the impugned order, the Special Court

had observed that the list of witnesses and the documents annexed to the complaint do not show the confirmation of Accused No.2. However, it would be premature to discharge the Accused. It is also observed that the Bank Statement relied by the Applicants shows the debit of Rs.60,000/-, which was made on 25th March 1995 in favour of Government Export Company by the Firm of Accused No.1 and that the sum of Rs.70,000/- was paid in cash by accused No.1 to Accused No.5. The transaction was executed through the agent -Accused No.5. The Special Court had observed that if the aforesaid fact is accepted, the case of cheating under section 420 of the Indian Penal Code may not be made out against Accused No.1. However, it would be premature to consider this defence in the light of averments in the complaint. The reasons assigned by the Sessions Court are not convincing. There is no document to show confirmation by Accused No.2. Since prima facie case of any penal offences is not made out, there was no question of directing the accused to face prosecution. In the circumstances, the order passed by the Sessions Court is required to be quashed and set aside. Hence, I pass the following order:

ORDER

(i) Criminal Revision Application No. 208 of 2002 is allowed;

(ii) The impugned order dated 5th of March, 2002 passed by the Special Judge, Greater Mumbai in Criminal Revision Application No. 542 of 1999 is set aside and the order dated 8th February, 1999 passed by the Metropolitan Magistrate, 20th Court, Mazgaon, Mumbai in Criminal Case No.1439/S/1998 dropping the proceedings against the Applicants is confirmed.

[PRAKASH D. NAIK, J.]

Tikam